LIBRARY
SUPREME COURT, U. S.

No. 73-278

FILED
SEP 6 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-278

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. The Board held that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by maintaining a rule denying off-duty employees access to non-work areas of the company premises to distribute union literature, and by reprimanding three employees for engaging in such activity. The Board rested its holding on two independent grounds: (a) the rule was not promulgated for legitimate business reasons, and was selectively enforced only to restrict union activity; and (b) even if validly motivated and applied even-handedly, the rule constituted an unreasonable impediment to the exercise by the company's employees of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. 157 (Pet. App. 33-40). The Board ordered petitioner to cease and desist from maintaining

and enforcing the rule (Pet. App. 41). The court of appeals enforced the order (Pet. App. 44).

2. The petition principally challenges the second ground for the Board's decision. That is, petitioner contends (Pet. 8-14) that the access of off-duty employees to plant premises should be governed by the rules that apply to outside organizers,[1] rather than those that apply to on-duty employees. It is unnecessary, however, for the Court to resolve that question in this case, because the Board's order is sufficiently supported by another ground of decision—*i.e.*, that the rule was discriminatorily applied.[2]

3. The only issue, then, is whether substantial evidence supports the Board's finding, sustained by the court below, that the company's rule was invoked solely against the distribution of union literature.[3] Such an

---

[1] Outside organizers are entitled to access only upon a showing that alternative methods of communicating with the employees are inadequate. *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105. Cf. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793.

[2] Nor is a different conclusion required by the fact that, subsequent to the court's decision in this case, the Board held that a rule denying off-duty employees access to plant premises for any purpose is presumptively valid. *GTE Lenkurt, Inc.*, 204 NLRB No. 75. In *Lenkurt*, the Board emphasized (at pp. 2-3) that "[t]here is no evidence that off-duty employees have, in fact, been allowed on the premises for purposes other than union solicitation or distribution of union literature, and hence there is no indication [the rule] has been disparately applied."

[3] It is well settled that a valid rule against literature distribution or solicitation applied in a discriminatory manner is unlawful. See, *e.g.*, *Revere Camera Co.* v. *National Labor Relations Board*, 304 F. 2d 162, 165 (C.A. 7); *National Labor Relations Board* v. *Shepherd Laundries Co.*, 440 F. 2d 856, 857 (C.A. 5); *National Labor Relations Board* v. *J. W. Mortell Co.*, 440 F. 2d 455, 457 (C.A. 7).

evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, there is ample basis for the Board's finding.

The Board found that off-duty employees frequently entered company premises without possessing passes for such diverse non-work related purposes as visiting the nurse, inquiring about insurance, retrieving personal belongings, or shopping at the company store (Pet. App. 34; A. 18a-19a, 52a-53a, 77a-79a, 81a-82a, 86a-88a, 92a).[4] Indeed, on one occasion, two employees entered the plant to begin leafleting on behalf of the union[5] without any questions from the guard. Subsequently, the employees were assured that they were engaging in permissible activity by the plant superintendent, who did not examine the handbills. They were later evicted by the security manager after he ascertained the content of the leaflets (Pet. App. 30-31; A. 36a-38a, 40a-43a, 68a-69a, 73a, 133a-134a). On this evidence, the Board properly concluded that the " 'non-access' rule has been ignored by the [company] for all purposes other than prohibiting its off-duty employees from distributing union literature on non-work portions of its premises" (Pet. App. 33).

---

[4] "A." refers to the appendix to the briefs in the court below, a copy of which has been lodged with the Clerk.

[5] International Brotherhood of Electrical Workers, AFL-CIO.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1973.

DOJ-1973-08